Editor's note: Reconsideration denied by order dated Jan. 27, 1983

DONN HOPKINS

IBLA 81-1064 Decided November 8, 1982

Appeal from decision of Alaska State Office, Bureau of Land Management, rejecting application for the lease of public land in connection with hot springs. AA-41790.

Affirmed.

1. Act of February 28, 1899 -- Bureau of Land Management -- Secretary of the Interior

   BLM is without jurisdiction to consider an application for the lease of public land near or adjacent to a hot springs where the land is within a national forest and the Act of February 28, 1899, as amended, 16 U.S.C. § 495 (1976), vests the Secretary of Agriculture with exclusive jurisdiction with respect to the issuance of such leases.

APPEARANCES: Donn Hopkins, pro se.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Donn Hopkins has appealed from a decision of the Alaska State Office, Bureau of Land Management (BLM), dated July 8, 1981, rejecting his application for the lease of public land in connection with the Bailey Bay Hot Springs, situated adjacent to Lake Shelokum in southeastern Alaska, for a term of 20 years.

On August 13, 1980, appellant filed an application with BLM for the lease of 160 acres of public land, described by metes and bounds, as a hot springs resort. Appellant stated that the resort facilities would include a lodge, cabins, camping facilities, bathhouse, and swimming pool, and would be available for use by the general public. 1/ The record indicates

1/ In his application, appellant also included a request for "such rights of way as are available for enhancement of the beneficial use of the land," including landing rights for airplanes on Lake Shelokum, use of an old wagon road from Bailey Bay to the hot springs and use of water for the generation of

that BLM determined that appellant's application included land within the E 1/2 E 1/2 SE 1/4 sec. 8, SW 1/4 sec. 9, N 1/2 NW 1/4 sec. 16, and E 1/2 NE 1/4 NE 1/4 NE 1/4 sec. 17, T. 68 S., R. 89 E., Copper River meridian, Alaska. In its July 1981 decision, BLM rejected appellant's application because BLM "does not have jurisdiction over the lands." BLM noted that the land was wholly within the Tongass National Forest. The decision also indicated that the land was partially within powersite classification (PSC) 192.

[1] Section 1 of the Act of February 28, 1899, as amended, 16 U.S.C. § 495 (1976), provides in part that:

> The Secretary of Agriculture is authorized, under such rules and regulations as he from time to time may make, to rent or lease to responsible persons or corporations applying therefor suitable spaces and portions of ground near, or adjacent to, mineral, medicinal, or other springs, within any national forest established within the United States, or hereafter to be established, and where the public is accustomed or desires to frequent, for health or pleasure, for the purpose of erecting upon such leased ground sanitariums or hotels, to be opened for the reception of the public.[2/] [Emphasis added.]

The regulations governing "special uses" this and other Acts are set forth at 36 CFR 251.50-251.64.

The record indicates that the land sought by appellant is included within the Tongass National Forest. The Master Title Plat for unsurveyed T. 68 S., R. 89 E., Copper River meridian, Alaska, dated March 4, 1981, states that, with the exception of patented land, "Entire Tp within Tongass NF." The Tongass National Forest was created by proclamation of President Theodore Roosevelt, acting in accordance with section 24 of the Act of March 3, 1891, 26 Stat. 1103, on September 10, 1907 (35 Stat. 2152). The proclamation stated that the land was "reserved from settlement, entry, or sale, and set apart as a public reservation, for the use and benefit of the people." The national forest was subsequently enlarged by Exec. Order No. 908 (July 2, 1908) and Proclamation No. 846 of February 16, 1909 (35 Stat. 2226). In addition, the land is included partially within PSC 192, dated November 14, 1927, which withdrew land around Lake Shelokum. Section 24 of the Federal Power Act, as amended, 16 U.S.C. § 818 (1976),

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fn. 1 (continued)
electricity. The issuance of rights-of-way for such purposes is governed by Subchapter V of the Federal Land Policy and Management Act (FLPMA) 43 U.S.C. § 1761 (1976). With respect to "lands within the National Forest System," the Secretary of Agriculture is accorded authority to issue rights-of-way. 43 U.S.C. § 1761 (1976). The lands involved herein are within the Tongass National Forest.

2/ The Act of Feb. 28, 1899, supra, originally delegated authority to the Secretary of the Interior, as to lands "within any forest reserves established within the United States." 30 Stat. 908 (1899). By the Act of Feb. 1, 1905, P.L. 34, 33 Stat. 628 (1905), Congress redelegated this authority to the Secretary of Agriculture.

provides that such land is "reserved from entry, location, or other disposal under the laws of the United States until otherwise directed by the [Federal Power] Commission or by Congress." See Juan N. Menchaca, 14 IBLA 212 (1974).

We note that comparable authority for the issuance of leases "near, or adjacent to, mineral, medicinal, or other springs" is provided to the Secretary of the Interior. The Act of March 3, 1925, 43 U.S.C. § 971 (1976), states:

> The Secretary of the Interior, upon such terms and under such regulations as he may deem proper, may permit responsible persons or associations to use and occupy, for the erection of bathhouses, hotels, or other improvements for the accommodation of the public, suitable spaces or tracts of land near or adjacent to mineral, medicinal, or other springs which are located upon unreserved public lands or public lands which have been withdrawn for the protection of such springs * * *. [Emphasis added.]

See 43 CFR 2311.4 (1980). In addition, the applicable regulation, 43 CFR 2311.4(b) (1980), provides that "[l]eases may be issued for surveyed or unsurveyed unreserved public lands in the several States." (Emphasis added.)

We must conclude, however, that the Secretary of Agriculture is vested with exclusive jurisdiction with respect to the issuance of such leases for land within a national forest. See Letter from Secretary Hitchcock to the Secretary of Agriculture, June 8, 1905, 33 L.D. 609 (1905); cf. Forest Exchanges, 60 I.D. 232 (1948).

In the above-described circumstances, the land cannot be considered "unreserved" as required by 43 U.S.C. § 971 (1976) and 43 CFR 2311.4(b) (1980). 3/ Nor can the land sought be deemed to be "withdrawn for the protection of such springs." We note that, while Exec. Order No. 1324-1/2 (Mar. 28, 1911) withdrew certain public land in Alaska containing hot or medicinal springs, that order was revoked, so far as it applied to lands within national forests, by Exec. Order No. 1883 (Jan. 24, 1914), and, as to other lands, by Public Land Order (PLO) No. 399, 12 FR 5780 (Aug. 28, 1947). PLO No. 399 also amended Exec. Order No. 5389 (July 7, 1930) to

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3/ The status of 43 CFR 2311.4(b) (1980) is unclear. The entire Part 2310 was deleted by regulations adopted on Jan. 19, 1981, 46 FR 5796, 5805. This deletion appears to have been inadvertent. In the Proposed Rulemaking, published on Dec. 4, 1979, the Department stated: "Section 2311.4 of subpart 2311 of this title, relating to leases authorized under the Act of March 3, 1925 (43 U.S.C. 971) * * * would be retained without any substantive change. Eventually, the provisions of § 2311.4 of this title will be transposed to a new subpart 2915 of this title." 44 FR 69868 (Dec. 4, 1979). The actual language of both the proposed and final rulemaking, however, simply deleted Part 2310 in its entirety with no savings provision for subpart 2311.4. 44 FR 69874 (Dec. 4, 1979); 46 FR 5805 (Jan. 19, 1981). Nor was the new subpart 2915 ever promulgated. There, thus, appears to be a regulatory lacuna as to leasing under the Act of Mar. 3, 1925. We trust this oversight will be remedied by adoption of clarifying regulations.

include the withdrawal of certain public land in Alaska containing hot or medicinal springs, but stated "Executive Order No. 5389, as herein amended, shall not apply to lands within National Forests." 12 FR 5780 (Aug. 28, 1947); see also PLO No. 614, 14 FR 6517 (Oct. 26, 1949). Since the tracts appellant seeks have been within the Tongass National Forest since 1907, the springs were not, according to these orders, "located upon * * * public lands which have been withdrawn for the protection of [mineral, medicinal, or other] springs" within the purview of the Act of March 3, 1925, supra.

In his statement of reasons for appeal, appellant contends that had there been a valid entry at the time the land was reserved as part of the Tongass National Forest, the land would have been excepted from the reservation, and that, upon a termination of that entry, the withdrawal of public land in Alaska containing hot springs would have taken effect. Leaving aside the fact that appellant's argument is totally in the realm of the hypothetical, his conclusion is erroneous.

The proclamation of September 10, 1907, provided that a "legal entry" would be excepted "from the force and effect of this proclamation," so long as it was maintained. 35 Stat. 2152; see also 35 Stat. 2228. As noted above, however, appellant has provided no evidence that the land was the subject of a "legal entry" at the time the land was reserved as part of the Tongass National Forest. 4/ But, even if the land was so excepted by the existence of an entry, upon cancellation of the entry the land would have, under the terms of the proclamation, been reserved as part of the Tongass National Forest. See, e.g., James F. Rapp, 60 I.D. 217 (1948). In these circumstances, the land could not be considered either "unreserved" or "withdrawn for the protection of such springs." 43 U.S.C. § 971 (1976).

Appellant also argues that the Federal Power Commission (FPC) may have determined that the land would "not be injured or destroyed for the purposes of power development by location, entry, or selection under the public-land laws," as provided by section 24 of the Federal Power Act, supra. Upon such a determination, the Secretary of the Interior would have been required to revoke the powersite withdrawal. See Reeves v. Andrus, 465 F. Supp. 1065 (D. Alaska 1979). Once again, however, appellant has presented no evidence that such an FPC determination has been made. In any event, until such time

4/ Appellant presents some evidence that efforts were made to establish a resort at the Bailey Bay Hot Springs in the early 1900's. Appellant quotes from a Geological Survey report, entitled Water-Supply Paper 418, which states at page 22:

"When visited in 1915 water from the lowest two springs was conducted to a wooden bathtub in a tent nearby. The other springs were unused, though a quantity of wood-stovepipe had been brought as far as the lake, the intention having been to pipe the hot water down to a hotel to be built near the bay." Appellant presents no evidence that a resort was ever built or that any efforts to establish a resort could be considered a "legal entry" at the time the land was reserved as part of the Tongass National Forest.

as the BLM records were noted to indicate that PSC 192 no longer applied to the lands sought, and that the lands were restored to entry, no rights could be acquired in such lands. See Carmel J. McIntyre (On Judicial Remand), 67 IBLA 317 (1982).

Appellant has presented no evidence that the land which he seeks is either subject to the jurisdiction of the Secretary of the Interior or available for leasing by BLM as a hot springs resort. Therefore, we conclude that BLM properly rejected appellant's application.

Pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

James L. Burski
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Douglas E. Henriques
Administrative Judge